IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

BRIAN ROBERT SILLICK.

Petitioner,

vs.

JOHN F. AULT, Warden, Anamosa State Penitentiary,

Respondent.

No. C02-0185

REPORT AND RECOMMENDATION

This matter comes before the court pursuant to petitioner Brian Sillick's application for a writ of habeas corpus under 28 U.S.C. § 2254 (docket number 1). Briefs on the merits of this matter have been submitted. This matter was referred to the undersigned United States Magistrate Judge for issuance of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). The undersigned recommends that the application for writ of habeas corpus be denied and this matter be dismissed.

I. PROCEDURAL POSTURE

On June 13, 1994, petitioner Brian Sillick (Sillick) was charged with first degree murder, in violation of Iowa Code §§ 707.1, 707.2 and 902.7, for killing his girlfriend, Tammi Wilson, on May 2, 1994. On January 30, 1995, Sillick's trial commenced. On February 9, 1995, the jury found Sillick guilty of first degree murder. On March 10, 1995, the Linn County District Court sentenced Sillick to life imprisonment.

¹ See State v. Sillick, FECR002422 (Linn County Dist. Ct. 1995).

² At trial, attorney David Grinde and attorney Quint Meyerdirk represented Sillick. On appeal, attorney Sharon Stevens represented Sillick.

On March 31, 1995, Sillick filed a notice of appeal. On direct appeal, Sillick argued the district court abused its discretion when excluding impeachment evidence, the district court erred when denying his motions for judgment of acquittal, and counsel provided ineffective assistance of counsel because he failed to object to a combined diminished responsibility and intoxication jury instruction and failed to impeach the State's expert witness. On February 26, 1997, the Iowa Court of Appeals rejected Sillick's claims, including his ineffective assistance of counsel claims, and affirmed Sillick's conviction.

On July 23, 1997, the Iowa Supreme Court reviewed Sillick's appeal; that is, it considered a challenge regarding the sufficiency of the evidence, a challenge concerning an evidentiary ruling and two challenges pertaining to ineffective assistance of counsel.⁴ The Iowa Supreme Court found there was sufficient evidence to support the first degree murder conviction, the Linn County District Court did not abuse its discretion when ruling on an evidentiary matter and any ineffective assistance of counsel claim derived from the challenged evidentiary ruling was moot. With respect to the other ineffective assistance of counsel challenge, the Iowa Supreme Court found error had not been preserved on Sillick's challenge to the combined jury instruction because he failed to object to that instruction at trial. Nonetheless, the Iowa Supreme Court advised Sillick to "develop his ineffectiveness claim by way of a postconviction proceeding." Consequently, the Iowa Supreme Court preserved for a possible postconviction relief proceeding Sillick's claim that trial counsel was ineffective in failing to object to an instruction that combined the concepts of intoxication and diminished responsibility. Based on its review, the Iowa Supreme Court vacated the decision of the Iowa Court of Appeals and affirmed the judgment of the Linn County District Court. Procedendo issued September 12, 1997.

³ <u>See State v. Sillick</u>, No. 6-569/95-0578 (Iowa Ct. App. 1997).

⁴ <u>See State v. Sillick</u>, No. 162/95-578 (Iowa 1997).

On June 16, 1998, Sillick challenged his conviction and resulting sentence by filing an application for postconviction relief in the Linn County District Court. In his application for postconviction relief, Sillick claimed: (1) the Linn County District Court abused its discretion in excluding impeachment evidence from the record; (2) counsel did not provide effective assistance; and (3) the State did not prove beyond a reasonable ground that he committed first degree murder. On November 21, 2000, the Linn County District Court denied Sillick's application for postconviction relief.

On November 30, 2000, Sillick filed an application for enlarged or amended findings pursuant to Iowa Rule of Civil Procedure 1.904(2). On December 7, 2000, the State resisted such application. On February 7, 2001, the Linn County District Court

Because Sillick's postconviction claims were related, the Linn County District Court addressed all of them in the context of ineffective assistance of counsel.

⁵ <u>See Sillick v. State</u>, LACV033083 (Linn County Dist. Ct. 2000). Throughout his state postconviction proceeding, attorney Jon Kinnamon represented Sillick. Attorney Jon Kinnamon also represents Sillick in the instant action.

⁶ With respect to the second claim, Sillick argues he received ineffective assistance because his trial counsel did not:

¹⁾ object to jury instructions that improperly combined two separate defenses; 2) object to jury instructions that omitted language from the essential elements of first degree murder; 3) request the first degree murder marshaling instruction include a jury finding for each defense interposed thereby compelling the jury to consider and determine mental capacity prior to entering a first degree murder verdict; 4) object to the Trial Information that failed to allege the essential elements for first degree murder; 5) object to the State's improper closing remarks; 6) object to the State's questioning of its expert as to mental capacity for malice and malice aforethought which were not at issue; 7) object to the use of a verdict form other than the verdict form required by law in cases where the defense of diminished responsibility is asserted; 8) request a reversal of the Linn County District Court's ruling on the State's motion in limine regarding a portion of the State's expert deposition.

denied, for the most part, Sillick's application for enlarged or amended findings. The Linn County District Court only amended its findings to reflect the Iowa Supreme Court preserved for postconviction review Sillick's ineffective assistance of counsel claim based upon trial counsel's failure to object to the jury instruction because it combined diminished responsibility and intoxication and failed to adequately explain the defense of diminished responsibility.

On February 12, 2001, Sillick filed a notice of appeal. On appeal, Sillick argued he received ineffective assistance of counsel because trial counsel failed to object to a jury instruction which combined his defenses of diminished responsibility and intoxication.⁷ Sillick also argued trial counsel provided ineffective assistance because he failed to allege: (1) the marshaling instruction on first degree murder misdefined the essential elements of that offense; (2) the Equal Protection Clause and Due Process Clause are applicable; (3) the jury was not given a separate verdict form on the issue of diminished responsibility; (4) the first degree murder marshaling instruction did not include as an element a requirement that the mental capacity of the defendant was not either diminished or influenced by intoxication; (5) the trial information did not specify the alternative of first degree murder upon which the State was relying; (6) the State made an improper comment during closing argument; (7) the State's expert witness testified improperly regarding the defendant's mental capacity; and (8) the Linn County District Court's pretrial ruling in limine excluding expert testimony which would have compared the defendant's case to other cases should have been reconsidered. With respect to his eight other ineffective assistance of counsel claims, Sillick asserted various grounds, including ineffective assistance of appellate counsel, as sufficient cause or reason for not raising them on direct The Iowa Court of Appeals only addressed the ground asserting ineffective assistance of appellate counsel as sufficient cause or reason because it required a review

⁷ <u>See Sillick v. State</u>, No. 01-0284, 2002 WL 31015257, 2002 Iowa App. LEXIS 989 (Iowa Ct. App. 2002).

of Sillick's ineffective assistance of counsel claims. After determining all of the ineffective assistance of counsel claims were wholly without merit, the Iowa Court of Appeals concluded Sillick only preserved error on his claim of ineffective assistance of counsel for failure to object to the combined jury instruction on diminished capacity and intoxication. When addressing the merits of such claim, the Iowa Court of Appeals concluded trial counsel was not ineffective in failing to object to the combined jury instruction on diminished capacity and intoxication. On September 11, 2002, the Iowa Court of Appeals affirmed the Linn County District Court's decision denying Sillick's application for postconviction relief. On December 2, 2002, the Iowa Supreme Court denied further review of Sillick's application for postconviction relief. On December 6, 2002, procedendo issued.

On December 30, 2002, Sillick filed the instant application for a writ of habeas corpus. In such application, Sillick contends he received ineffective assistance of counsel at trial and on direct appeal. To support his contention, Sillick states:

- (1) trial counsel . . . notified the [State] that [he] was going to raise intoxication and diminished responsibility as a defense to first degree murder, a specific intent crime. [Although] trial counsel . . . knew that the legal definition of each defense was separate and distinct, [his] case was submitted to the jury under instructions that failed to define diminished responsibility and to distinguish it from intoxication. . . .
- (2) . . . counsel failed to preserve error regarding fundamentally flawed jury instructions at each tier of the Iowa courts. The marshaling instruction submitted to the jury in [his] case commingled and misdefined essential elements of first degree murder as defined in <u>State v. Hofer</u>, 28 N.W.2d 475, 482-485 (Iowa 1947).
- (3) the marshaling instruction failed to list all the jury findings and elements that the State had to prove before the jury was authorized to enter a verdict of guilty to first degree murder as required by Iowa law. The State had the burden to disprove

diminished responsibility (legal capacity) and to prove the requisite specific intent for first degree murder. . . .

- (4) . . . counsel . . . failed to raise a due process and equal protection claim that the essential elements as defined and submitted to the jury in [his] case were at variance with the definition of [the] essential elements in <u>State v. Hofer</u>, 28 N.W.2d 475 (Iowa 1947).
- (5) . . . [the state trial record, examined as a whole, shows counsel provided ineffective assistance of counsel.] Trial counsel failed to obtain a separate verdict form on diminished responsibility[, the State, without objection,] illegally disparaged the "defense" of diminished responsibility in the abstract, and counsel failed to present impeachment evidence of a state expert.

On March 17, 2003, the court conducted an initial review of Sillick's application for a writ of habeas corpus and ordered the respondent to file an answer. On April 17, 2003, the respondent complied with the court's order. On August 27, 2003, the court entered an order establishing a briefing schedule.

Pursuant to the briefing schedule, Sillick submitted a brief supporting his application for a writ of habeas corpus. In such brief, Sillick asserts the theory of ineffective assistance of counsel and addresses three issues under such theory: (1) an instructional error on mental capacity; (2) an instructional error or misdescription of the statutory elements required for a specific intent; and (3) the totality of the circumstances. ⁸ In

In the body of his brief, Sillick describes these issues in the following manner: (1) ineffectiveness of trial counsel and appellate counsel to challenge the jury instructions that contained due process violations; (2) ineffectiveness of trial counsel and appellate counsel in failing to challenge the definitional components of the intent for first degree murder which misdefined the requisite statutory intent, removed or lessened the State's burden of proof and denied Sillick due process and equal protection; and (3) ineffectiveness of trial counsel and appellate counsel under the entirety of the circumstances, that is, in light of all omissions and failures, including no challenge to a Trial Information void of essential elements, no objection to lack of a diminished (continued...)

response to Sillick's brief on the merits, respondent submitted a brief. The respondent argues: (1) the determinations made by the courts of Iowa were not unreasonable in rejecting Sillick's claim that his trial co-counsel were ineffective in choosing to submit a combined jury instruction on diminished responsibility and intoxication; (2) the determinations made by the courts of Iowa were not unreasonable in rejecting Sillick's claim that his trial co-counsel were ineffective for not raising various meritless issues generally relating to first degree marshaling instructions; (3) Sillick's claim of cumulative error is procedurally defaulted, fails to state a claim and is without merit; and (4) appellate counsel was not ineffective.

On December 2, 2003, Sillick filed a reply brief. Sillick argued: (1) "instructional due process issues of omitted finding of mental capacity from the [marshaling] instruction and a misdescription of elements of specific intent" and (2) "the [postconviction relief] trial court and the [postconviction relief] appellate courts ruled on the merits on all underlying ineffectiveness and . . . his underlying postconviction claims were reviewable under Wainright v. Sykes, 433 U.S. 72 (1977)." Based on Sillick's reply brief, respondent filed an additional brief on December 4, 2003. In that brief, the respondent asserted "that a litigant generally should not be allowed to argue for the first time in a reply brief any claim, issue, or legal argument abandoned in initial merits briefing." The respondent also discussed Massaro v. United States, 538 U.S. 500 (2003), a case Sillick cited.

⁸(...continued) responsibility verdict form, no challenge to the State's closing argument and no exercise of Sillicks' right to compulsory process in regard to the impeachment of expert trial testimony.

⁹ Given the various ways the arguments or issues are characterized, the court elects to address Sillick's three ineffective assistance of counsel arguments under the following headings: (1) Combined Jury Instruction on Diminished Responsibility and Intoxication; (2) Definitions and Elements in First Degree Murder Instructions; and (3) Cumulative Error.

II. EVIDENCE AT TRIAL

On the morning of May 2, 1994, eight year old Lindsey Wilson awoke to the sound of her mother, Tammi Wilson, arguing with Sillick. Tammi Wilson got a donut for Lindsey Wilson. As she sat and ate her donut, Lindsey Wilson listened to Sillick and Tammi Wilson. Sillick yelled at Tammi Wilson, and Tammi Wilson cried. Lindsey Wilson watched as Sillick went into a bedroom, returned with a sawed-off shotgun, and shot her mother. Lindsey Wilson testified that, before Sillick shot her mother, she heard her mother say, "don't do this in front of my kids." Sillick shot Tammi Wilson three times with the sawed-off shotgun. Police later discovered a fourth hole from the shotgun in the carpeting on the hallway floor. Such hole was just above Tammi Wilson's head. Lindsey Wilson watched as Sillick, still holding the gun, retrieved his keys from the television room and "drove off." Sillick drove to the Cedar Rapids Police Station, approached several officers standing outside of the building, stuck out his hands, dropped his keys on the pavement, and announced: "I just shot somebody. I want to give myself up."

At trial, the case was defended on the theory that Sillick, due to his extensive use of cocaine and consumption of alcohol, did not have the requisite specific intent to kill Tammi Wilson in order to be convicted of first degree murder. Sillick asserted through evidence and testimony, not his own, that he had a history of depression, had a history of drug and alcohol abuse, had sought treatment for drug and alcohol abuse, had been using cocaine for several days prior to shooting Tammi Wilson and had been drinking beer on the morning of the crime. A defense expert testified that, during an interview with Sillick concerning the time prior to shooting Tammi Wilson, Sillick relayed that he had not slept for four days, had been hearing voices and had hallucinated through the morning of the shooting and had experienced paranoia and panic. According to expert testimony regarding an interview with Sillick, Sillick did not remember actually shooting Tammi Wilson but recalled stepping over her body and "beginning to hunt for his car keys." A

defense expert testified that Sillick met the criteria for "cocaine psychosis" at the time of the shooting.

The jury relied on this evidence and other evidence presented at trial to find Sillick guilty of first degree murder. Similarly, the court relied on such evidence to sentence Sillick to life imprisonment.

III. CONCLUSIONS OF LAW

A. Standards Under 28 U.S.C. § 2254

Title 28 U.S.C. § 2254, states in pertinent part, that a person in custody pursuant to the judgment of a State court may seek a writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Under 28 U.S.C. § 2254, the power of the federal courts to review state convictions is limited. Carter v. Armontrout, 929 F.2d 1294, 1296 (8th Cir. 1991). Habeas corpus relief is available only where errors of constitutional magnitude have occurred. Id.; Newlon v. Armontrout, 885 F.2d 1328, 1336 (8th Cir. 1989), cert denied, 497 U.S. 1038 (1990).

A petitioner must show more than an error requiring reversal on direct appeal to obtain relief. He must show that the alleged error rendered the entire trial fundamentally unfair—"that there is a 'reasonable probability that the error complained of affected the outcome of the trial—i.e., that absent the alleged impropriety, the verdict probably would have been different.'" Newlon, 885 F.2d at 1337 (quoting Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir.) (en banc), cert denied, 483 U.S. 1023, 107 S. Ct. 3270, 97 L. Ed. 2d 768 (1987)).

B. Standard Regarding Ineffective Assistance of Counsel

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." <u>Strickland v. Washington</u>, 466 U.S. 668, 684 (1984).

[T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364 (1993) (quoting <u>United States v. Cronic</u>, 466 U.S. 648, 658 (1984)). A criminal defendant is also entitled to effective assistance of counsel on a first appeal as of right. <u>Rogers v. United States</u>, 1 F.3d 697, 700 (8th Cir. 1993); <u>Estes v. United States</u>, 883 F.2d 645, 648 (8th Cir. 1989).

The United States Supreme Court has reformulated the <u>Strickland</u> test for constitutionally ineffective assistance of counsel in <u>Lockhart v. Fretwell</u>, 506 U.S. 364 (1993), and the Eighth Circuit Court of Appeals has applied that test.

Counsel is constitutionally ineffective under <u>Fretwell</u> when: (1) counsel's representation falls below an objective standard of reasonableness; and (2) the errors are so prejudicial that the adversarial balance between defense and prosecution is upset, and the verdict is rendered suspect.

English v. United States, 998 F.2d 609, 613 (8th Cir. 1993) (citing Lockhart, 506 U.S. at ____, 113 S. Ct. at 842-43). Review of trial counsel's performance is deferential and the presumption is that trial counsel was competent and effective. Strickland, supra, at 689; Smith v. Lockhart, 921 F.2d 154, 156 (8th Cir. 1990). Reasonable trial strategy cannot rise to the level of ineffective assistance of counsel. Id. (citing Stacey v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986)). Counsel's strategic decisions "made after a thorough investigation of law and facts . . . are virtually unchallengeable," Strickland, supra, at 690, even if those strategic decisions prove unwise. Wing v. Sargent, 940 F.2d 1189, 1191 (8th Cir. 1991) (citing Walker v. Lockhart, 852 F.2d 379, 381 (8th Cir. 1988), cert denied, 489 U.S. 1088 (1989)). Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Strickland, supra, at 693.

Where conduct does not prejudice the defendant, the court need not address the reasonableness of that conduct. <u>Id.</u> at 691; <u>United States v. Williams</u>, 994 F.2d 1287, 1291 (8th Cir. 1993). To determine whether there is prejudice, the court examines

whether the result has been rendered "unreliable or fundamentally unfair" as the result of counsel's performance. Lockhart v. Fretwell, 506 U.S. 364 (1993); West v. United States, 994 F.2d 510, 513 (8th Cir. 1993). Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. Id. at 372; West v. United States, 994 F.2d 510, 513 (8th Cir. 1993) (quoting Fretwell). Prejudice does not exist unless "there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." Strickland, supra, at 694; Williams, 994 F.2d at 1291 (quoting Strickland).

C. Sillick's Arguments Under 28 U.S.C. § 2254

As a preliminary matter, the court notes Sillick seeks to challenge the jury instructions themselves, in addition to challenging the effectiveness of his counsel in failing to object to the instructions on the basis of the definitions, elements, or the combined instruction. Such a challenge must fail because Sillick has not presented this claim to the state courts for exhaustion and therefore must demonstrate cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim. Wainright v. Sykes, 433 U.S. 72 (1977), McDonald, 101 F.3d at 598.

In addition, a federal habeas court's power to set aside a state conviction on the basis of an allegedly improper jury charge is far more circumscribed than that exercised by an appellate court on direct review. Guichard v. Smith, 471 F. Supp. 784, 791 (E.D.N.Y. 1979). The formulation of jury instructions primarily concerns the application and interpretation of state law and a federal habeas court is not to re-examine state-court determinations on state-law questions. Louisell v. Director of Iowa Dept. of Corrections, 178 F.3d 1019, 1022 (8th Cir. 1999) (citing Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)). A finding that a jury instruction is permissible under state law does not dispose of a due process inquiry. See Louisell, 178 F.3d at 1022 (citing Estelle, 502 U.S. at 68). The burden of demonstrating that an erroneous instruction was so prejudicial that it will

support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. <u>Id.</u> (citing <u>Cupp v. Naughten</u>, 414 U.S. 141, 147 (1973)). The inquiry is whether the ailing instruction, by itself, so infected the entire trial that the resulting conviction violates due process. <u>Id.</u> It is not enough for a petitioner to show that an instruction was "undesirable, erroneous, or even 'universally condemned.'" <u>Id.</u> (citing <u>Cupp</u>, 414 U.S. at 146). "Habeas corpus relief may be granted only when an erroneous jury instruction constituted 'a fundamental defect' that resulted 'in a complete miscarriage of justice, [or] an omission inconsistent with rudimentary demands of a fair trial.'" <u>Id.</u> (quoting <u>Crump v. Caspari</u>, 116 F.3d 326, 327 (8th Cir. 1997)).

The court finds that the jury instructions, when viewed as a whole, were not misleading. See Id. (citing Boyde v. California, 494 U.S. 370, 380 (1990)). The instructions conveyed to the jury that whenever the court instructed that the state must prove something, it must do so beyond a reasonable doubt. They informed the jury that the state must prove all the elements of first degree murder, including that the defendant acted with malice aforethought, acted wilfully, deliberately, premeditatedly, and with a specific intent to kill Tammi Wilson. The instructions described diminished capacity and intoxication and their relationship to the specific intent to kill. They conveyed to the jury that Sillick did not have to prove diminished responsibility or intoxication but rather that the state had to prove that the defendant was able to, and did, form the specific intent required. The instructions informed the jury that murder in the second degree does not require a specific intent to kill. Thus, Sillick has failed to demonstrate ineffective assistance of counsel as cause for the procedural default and prejudice attributable thereto and may not obtain review of his defaulted claim concerning the jury instructions. See Wainright, supra, at 72.

1. Combined Jury Instruction on Diminished Responsibility and Intoxication

Sillick first contends that his trial counsel was ineffective for failing to object to a combined jury instruction, Instruction No. 20, on diminished responsibility and intoxication. Specifically, Sillick asserts that Instruction No. 20 was erroneous for its failure to adequately explain both the defenses of diminished responsibility and intoxication. In response, the respondent argues that Sillick's claims in regard to the combined jury instruction "consist largely of policy statements," that his trial counsel was not ineffective for failing to object to the combined instruction, and that the lower courts did not make an unreasonable determination in finding that Sillick's trial counsel was not ineffective.

On review of Sillick's application for postconviction relief, the Linn County District Court analyzed whether Sillick's trial counsel's decision to combine the jury instructions of diminished responsibility and intoxication was "tactical". Sillick v. State, LACV033083 (Linn County Dist. Ct. 2000). The Linn County District Court noted that Sillick's trial counsel testified that he and his co-counsel felt that a combined instruction would be less confusing to the jury. <u>Id.</u> The Linn County District Court held that trial counsel's decision was well within the range of normal competency required of a defense attorney. Id. The Linn County Court of Appeals also held that there was no evidence in the record to support a finding that the combined jury instruction was confusing to the jury. <u>Id.</u> The Iowa Court of Appeals, on review of the Linn County District Court's postconviction relief decision, likewise pointed out that Sillick's trial counsel reportedly settled on the combined instruction because due to "the specific nature of this case in which the intoxication aspect and the diminished responsibility aspect were so intermeshed, it would be more confusing to the jury to have two separate instructions." Sillick v. State, No. 01-0284, 2002 WL 31015257, 2002 Iowa App. LEXIS 989 (Iowa Ct. App. 2002). The Iowa Court of Appeals held that trial counsel's decision was "strategic," and that upon evaluation of the

instructions as a whole, any appropriate concepts not included in the trial court's instruction on diminished capacity and intoxication were nevertheless "adequately explained" in other instructions. Sillick v. State, No. 01-0284, 2002 WL 31015257, 2002 Iowa App. LEXIS 989 (Iowa Ct. App. 2002) (citing State v. Chambers, 529 N.W.2d 617, 620 (Iowa Ct. App. 1994)).

The court finds that Sillick's trial counsel's performance in adopting the combined jury instruction on diminished responsibility and intoxication did not fall below an objective standard of reasonableness. See English, supra, at 613. Trial counsel's decision to adopt the combined instruction was based upon a bona fide interest in avoiding juror confusion as to the defenses and also was made in reasonable reliance upon the trial court's representation that the combined instruction had been used in a similar case. Further, the record indicates that the experts at Sillick's trial generally agreed that the two conditions of diminished capacity and intoxication were closely related, and evidence concerning the two defenses was highly intermeshed during the trial. Moreover, as the respondent has pointed out, it is not at all clear that Sillick was entitled to an instruction on diminished capacity in addition to the instruction on intoxication. "When the evidence shows the mental condition at issue was caused by voluntary intoxication it is sufficient to instruct on that issue and not give an additional instruction on diminished responsibility generally." State v. Aguilar, 325 N.W.2d 100, 103 (Iowa 1982) (citing State v. Collins, 305 N.W.2d 434, 437-38 (Iowa 1981)). The court finds that in light of the evidence contained in the record, it was reasonable for Sillick's trial counsel to present their two defenses in a single instruction in an effort to avoid juror confusion and muster any additional strength which may have come from the jury's consideration of the two defenses together.

Even if the court were to determine that Instruction No. 20 was inadequate, which it has not, Sillick has failed to demonstrate that but for his trial counsel's conduct in adopting the combined instruction, the outcome of his trial would have been any different. Strickland, supra, at 694. As the Linn County District Court found on review of Sillick's

post conviction relief application, there simply is no evidence in the record which indicates that the combined jury instruction was confusing to the jury. The court finds that Instruction No. 20 adequately apprised the jury of both of the defenses asserted by Sillick. Accordingly, Sillick has failed to establish that he suffered prejudice as the result of his trial counsel's alleged errors. See Lockhart, supra, 506 U.S. 364 (1993).

Both the Linn County District Court and the Iowa Court of Appeals, on postconviction review, decided Sillick's ineffective assistance of counsel claim concerning the combined jury instruction on their merits. In <u>Williams v. Taylor</u>, The United States Supreme Court set forth the standard of review pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 for claims adjudicated on the merits in state court:

Section 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'

Williams v. Taylor, 529 U.S. 362, 364-65 (2000). A state court decision is "contrary" if the state court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court "on a set of materially indistinguishable facts." Id. A state court's decision is an "unreasonable application" of Federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the petitioner's case. Id. A federal habeas court should ask whether the state court's application of clearly established federal law was objectively unreasonable. Evans v. Rogerson, 223 F.3d 869, 872 (8th Cir. 2000) (citing Williams, 529 U.S. at 365). A

federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly, that application must also be unreasonable. <u>Copeland v. Washington</u>, 232 F.3d 969, 973 (8th Cir. 2000) (citing <u>Williams</u>, 529 U.S. at 366).

The court, having found that Sillick's trial counsel breached no duty in adopting the combined jury instruction, further finds that Sillick has failed to demonstrate resulting prejudice. See Strickland, supra, at 694. Accordingly, the court finds that the lower courts' determination of Sillick's ineffective assistance of counsel claim was not an "unreasonable" application of the Strickland standard.

2. Definitions and Elements in First Degree Murder Jury Instructions

Sillick next contends that he was denied effective assistance of counsel because his trial and appellate counsel failed to object to the jury instructions on first degree murder on the basis that they "omitted, misdefined, or merged essential elements of first degree statutory murder." Specifically, Sillick contends that because the Iowa Criminal Jury first degree murder instructions cite as authority the 1947 case of <u>State v. Hofer</u>, instructions on first degree murder in Iowa cannot deviate from the <u>Hofer</u> definitions, as his did. Sillick also contends that Instruction No. 15 should have contained an explicit

The Linn County District Court used Iowa Criminal Jury Instructions 700.5 and 700.6 to define the elements of first degree murder in the jury instructions. The Iowa Criminal Jury Instructions on first degree murder cite as authority <u>State v. Hofer</u>, 28 N.W.2d 475 (Iowa 1947).

¹¹ In <u>State v. Hofer</u>, the instruction which was approved by the court on "malice aforethought," was, in relevant part as follows:

[[]M]alice aforethought is a fixed purpose or design to do some physical harm to another existing prior to the act complained of; it need not be shown to have existed for any length of time before . . . it is sufficient if such purpose was formed before and continued to exist at the time of the injury . . .

State v. Hofer, 28 N.W.2d 475, 482 (Iowa 1947). The instruction on wilfulness approved (continued...)

finding on mental capacity or a reference to the mental capacity instruction contained in Instruction No. 20. In response, the respondent argues that the first degree murder instructions in Sillick's trial were not erroneous, that Sillick's trial and appellate counsel were not ineffective for failing to raise the issue, and, accordingly that the Linn County District Court's and the Iowa Court of Appeals' dismissal of Sillick's claim concerning the first degree murder instructions was not unreasonable.

The Linn County District Court, on review of Sillick's application for postconviction review, did not specifically address Sillick's claim regarding the first degree murder instructions on the merits, but indicated that they had nevertheless examined the claim and found that Sillick's "trial counsel as well as [his] appellate counsel acted well within the range of normal competency required of a defense attorney." Sillick v. State, LACV033083 (Linn County Dist. Ct. 2000). When reviewing the Linn County District Court's denial of postconviction relief, the Iowa Court of Appeals dismissed Sillick's claim concerning the definitions contained in the first degree murder jury instructions. Sillick v. State, No. 01-0284, 2002 WL 31015257, 2002 Iowa App. LEXIS 989 (Iowa Ct. App. 2002). Before doing so, the Iowa Court of Appeals held that the first degree murder instructions in Sillick's trial were consistent with the Hofer definitions and did not violate Sillick's due process or equal protection rights. Id. The Iowa Court of Appeals also held that, although the definition of "malice aforethought" in Sillick's trial instructions was incomplete in that it did not inform the jury that the requisite mental state must continue to exist at the time the act was committed, such omission was "not prejudicial because the

^{11(...}continued)

by the <u>Hofer</u> court read, "'wilful' means the act was the result of the conscious will of the perpetrator, was of purpose, intentional and not accidental." <u>Id.</u> at 483. The <u>Hofer</u> court also approved an instruction on "deliberateness" which read, "the act was the result of a purpose formed after weighing the considerations for and against the doing of the act." <u>Id.</u> Finally, the <u>Hofer</u> court approved the following instruction on "premeditation:" "'premeditated' means the act was thought of beforehand and done in pursuance of a prior intention or plan." <u>Id.</u>

marshaling instruction makes it clear it must also exist at the time of the act." <u>Id.</u> (citing <u>State v. Lee</u>, 494 N.W.2d 706, 707 (Iowa 1993)). ¹² The Iowa Court of Appeals went on to hold that Instruction No. 15 was not inadequate for failing to require the State to disprove Sillick's defenses as an added element of their case because the State simply is not required to do so. <u>Id.</u> (citing <u>State v. Rinehart</u>, 283 N.W.2d 319, 320 (Iowa 1979) (diminished responsibility); <u>State v. Templeton</u>, 258 N.W.2d 380, 383 (Iowa 1977) (intoxication)). Finally, the Iowa Court of Appeals held that Instruction No. 20, which instructed the jury as to the defenses of diminished responsibility and intoxication, adequately informed the jury as to Sillick's defenses and the State's burden to prove that Sillick "was able to, and did, form the specific intent required." <u>Id.</u>

The court finds that Sillick's trial and appellate counsels' decisions not to object to or raise as an issue the definitions and elements contained in the first degree murder instructions did not fall below an objective standard of reasonable representation. English, supra, at 613. In regard to Sillick's contention that the first degree murder instructions in his case should not have varied from the definitions in Hofer, the court finds that there is no mandate that first degree murder instructions must be a verbatim recitation of the definitions approved of in Hofer. See Hall v. State, 665 N.W.2d 439, 2003 WL 1524140 (Iowa Ct. App. 2003). "It is well settled that a trial court need not instruct in a particular way so long as the subject matter of the applicable law is correctly covered when all the

State v. Lee addressed a very similar definition of malice aforethought as that used in Sillick's trial. The court in Lee held that any ambiguity concerning the malice element was sufficiently dissipated when that instruction was read in conjunction with the marshaling instruction. State v. Lee, 494 N.W.2d 706, 707 (Iowa 1993). The marshaling instruction in Lee, like Instruction No. 15 in Sillick's trial, required that the defendant be found to have "acted" with malice aforethought, which the court found to adequately convey that the defendant must have so acted with respect to shooting the victim. See Id. The court in Lee further noted that the requisite relationship between malice aforethought and specific intent is more accurately characterized as a "causal" rather than a "temporal" relationship. Id.

instructions are read together." State v. Uthe, 542 N.W.2d 810, 815 (Iowa 1996) (citing State v. Monk, 514 N.W.2d 448, 450-51 (Iowa 1994)). The fact that an instruction may be less preferable than another does not mean that the less preferable instruction is erroneous. See Uthe, supra, at 815. Rather, the appropriate determination is whether the instructions actually given were adequate to instruct the jury on any given element of the offense. See Id. There were no material elements of the offense omitted from the jury instructions in Sillick's trial. When considered as a whole, the instructions in Sillick's trial accurately conveyed to the jury the definitions and elements of first degree murder, and Sillick's defenses, under Iowa law. 13 With respect to Sillick's argument that the jury instruction defining premeditation, deliberation, and malice aforethought was improper for failing to specify that each must continue to exist at the time of the criminal act, the court finds that the instruction was proper. Hall, supra, at *3 (citing State v. Lee, 494 N.W.2d 706, 707 (Iowa 1993); State v. Thompson, 570 N.W.2d 765, 769-70 (Iowa 1997)). Specifically, Instruction No. 15 required a finding that Sillick "acted" with premeditation, wilfulness, deliberateness, and malice aforethought, and consequently the jury was adequately advised that Sillick must have possessed those mental states both before and at the time of the criminal act. See Id. With respect to Sillick's contention that the instructions should have included a finding that the State had disproved Sillick's defenses, the court finds that the State was not required to disprove Sillick's defenses of diminished responsibility and intoxication as an added element of their case against him, and Sillick

The Iowa Court of Appeals, on review of the Linn County District Court's post conviction review decision, specifically noted that Iowa courts "evaluate instructions as a whole, not piecemeal or in artificial isolation." <u>Sillick v. State</u>, No. 01-0284, 2002 WL 31015257, 2002 Iowa App. LEXIS 989 (Iowa Ct. App. 2002) (citing <u>State v. Chambers</u>, 529 N.W.2d 617, 620 (Iowa Ct. App. 1994)).

was thus not entitled to an instruction to that effect. State v. Rinehart, 283 N.W.2d 319, 320 (Iowa 1979); State v. Templeton, 258 N.W.2d 380, 383 (Iowa 1977). Significantly, Instruction No. 20 notified the jury that "the burden is on the State to prove that [Sillick] was able to, and did, form the specific intent required." Instruction No. 15 likewise advised the jury that the State carried the burden of proving that Sillick had the specific intent to kill. Therefore, the instructions read as a whole make clear that the State bears the burden of proof on the essential element of intent. Holmes, supra, at 826.

In sum, the court finds that the instructions in Sillick's trial adequately conveyed the requisite elements for first degree murder and further accurately represented the burden of proof concerning the defenses presented. Accordingly, the court holds that Sillick's trial and appellate counsel were not ineffective for failing to object to, or raise on appeal, the first degree murder instructions. Because there was no deficient performance on the part of Sillick's trial and appellate counsel in regard to the first degree murder instructions, the court finds that Sillick has failed to demonstrate prejudice. The court thus finds that the lower courts did not unreasonably apply the <u>Strickland</u> ineffectiveness standard in determining Sillick's ineffective assistance of counsel claim concerning the first degree murder instructions. See Williams, supra, at 364-65; Evans, supra, at 872.

3. Cumulative Error

Finally, Sillick claims that he was denied effective assistance of counsel based on various cumulative errors made by trial counsel and appellate counsel. Sillick's claim of cumulative error is that several failures of his trial and appellate counsel amounted to cumulative error which culminated in his receiving ineffective assistance of counsel. Specifically, Sillick contends that he was denied effective assistance of counsel as a result

The court notes that, in Iowa, an instruction on intoxication does not need to state that the State must disprove the defense. <u>See State v. Holmes</u>, 276 N.W.2d 823, 826 (Iowa 1979). The court further notes that pursuant to Iowa law, a defense of diminished responsibility does not require the State to disprove the defense as an additional element of its case. Rinehart, supra, at 320.

of his trial and appellate counsel's failure to object to the Trial Information, failure to preserve error on the prosecutor's closing remarks, failure to object to the omission of a verdict form which was required by Iowa law in diminished capacity defense cases, and failure to request a reversal of the trial court's motion in limine ruling concerning a state expert witness. In response, the respondent argues that Sillick's cumulative error claim is procedurally defaulted, fails to state a claim for federal habeas relief, and is without merit. ¹⁵

The Iowa Court of Appeals, on review of the district court's postconviction relief decision, analyzed each of Sillick's cumulative claims on the merits. See Sillick v. State, No. 01-0284, 2002 WL 31015257, 2002 Iowa App. LEXIS 989 (Iowa Ct. App. 2002). The Iowa Court of Appeals found Sillick's claim concerning the allegedly deficient trial Information to be meritless. Id. The Iowa Court of Appeals held that the Trial Information complied with the applicable state rules of criminal procedure, that it named the offense and identified by number the statutory provisions the defendant was charged with having violated, and that it was therefore "sufficient to give the court and [Sillick] notice of the offense charged." Id. The Iowa Court of Appeals further noted that in reviewing a claim that a Trial Information is constitutionally deficient, Iowa courts consider not only the Trial Information, but also the minutes of evidence, to determine whether the allegations contained in the Trial Information adequately apprise a defendant of the offense charged. Id. (citing State v. Grice, 515 N.W.2d 20, 23 (Iowa 1994)).

The court finds that Sillick has failed to establish that there existed a jurisdictional defect in the Trial Information which implicated his due process right of notice. The Trial

Although the court rejects Sillick's application for writ of habeas corpus based upon the merits of his ineffective assistance of counsel claims, the court finds persuasive the respondent's argument that Sillick's cumulative error claims are also procedurally defaulted as he has not presented such claims to the state courts for exhaustion and has failed to demonstrate cause for the procedural default and prejudice attributable thereto. See McDonald, supra, at 598.

Information in Sillick's case adequately informed him, his attorneys, and the trial court as to what statutory provisions he was accused of having violated. Therefore, Sillick's trial and appellate counsel breached no duty or caused any prejudice to Sillick in failing to object to the Trial Information. See English, supra, at 613.

The Iowa Court of Appeals also found that Sillick's claim of ineffective assistance based upon his counsel's failure to object to the prosecutor's closing remarks was meritless. See Sillick v. State, 2002 WL 31015257. The closing remarks at issue were as follows:

Now Instruction No. 20 is the one that deals with this subject. It's a defense which a lot of people don't like. If they had their way, it wouldn't exist. People don't like other people getting away with activity, avoiding responsibility because of drug usage; but that is the law as expressed in Instruction 20, and you must follow your oath as a juror to apply that law, but don't become an advocate for the Defendant. Don't overdo it. Do what it says.

Sillick's trial counsel testified that he interpreted these remarks to mean that, "although people might not like the defense of diminished capacity or intoxication, the jury would be well within its right to accept such a defense and return a verdict of murder in the second degree." Id. Sillick's trial counsel went on to explain that he understood the remarks to be "almost . . . an invitation . . . to come down . . . to murder two." Id. The Iowa Court of Appeals evaluated trial counsel's interpretation, determined that it was a "reasonable" interpretation, and accordingly found that trial counsel's decision to not object was a "reasonable trial strategy." Id.

The court finds that Sillick's trial counsel's decision to refrain from objecting to the prosecutor's closing remarks did not fall below an objective standard of reasonable representation. See English, supra, at 613. The United States Supreme Court has provided guidance for determining whether a closing argument in the guilt phase of a trial

has violated a defendant's right of due process. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). An improper closing argument in the guilt phase of a trial reaches the level of constitutional error if counsel's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Copeland, 232 F.3d at 974 (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). In Sillick's trial, the offending portion of the prosecutor's closing remark cannot be said to have "so infected the trial" that his first degree murder conviction was a denial of due process. Id. Significantly, the offensive remark was immediately followed by a caution to the jury that they must follow the law and "do what it says." The court finds that Sillick's trial counsel was not "ineffective" for refraining from objecting to the State's closing remarks, and Sillick's appellate counsel was likewise not "ineffective" in failing to raise this issue on direct appeal.

The Iowa Court of Appeals also reviewed Sillick's claim that trial and appellate counsel were ineffective for failing to object to, and failing to raise on appeal, the omission of a verdict form which is required by Iowa law in cases where diminished responsibility is asserted as a defense. See Sillick v. State, 2002 WL 31015257. The Iowa Court of Appeals noted that the Iowa Rules of Criminal Procedure do require that "if the defense is diminished responsibility the jury must be instructed that if it so acquits the defendant on that ground it shall so state in its verdict." Id. (citing Iowa R. Crim. P. 2.22(8)(a)). The Iowa Court of Appeals went on to hold that Sillick's trial counsel had thus breached an essential duty, but that there was no "resulting prejudice" because the "verdict form in question and the related instruction would be of significance only if there was a reasonable possibility of complete acquittal." Id. The Iowa Court of Appeals reasoned that in the instant case there was "essentially no chance" nor was it the goal of defense counsel that Sillick be acquitted. Id. In addition, the Iowa Court of Appeals held that regardless of the low probability of an acquittal, "the jury instructions and verdict forms" submitted in Sillick's trial were "fully adequate to allow the jury to find [Sillick] not guilty of first-

degree murder but guilty of a lesser included offense, or to find [Sillick] not guilty and acquit him, whether because of diminished responsibility or because the State otherwise did not prove its case." <u>Id.</u>

The court agrees with the Iowa Court of Appeals that, pursuant to Iowa Rule of Criminal Procedure 2.22(8)(a), Sillick's trial counsel breached a duty by failing to object to the omission of the requisite verdict form. See Id. The court further agrees that Sillick has failed to demonstrate that counsel's errors were "so prejudicial that the adversarial balance between defense and prosecution [was] upset," nor has he shown that trial counsel's errors rendered the verdict "suspect." <u>Lockhart v. Fretwell, supra. English v.</u> United States, 998 F.2d 609, 613 (8th Cir. 1993), cert denied, 510 U.S. 1001 (1993); Cf. Strickland v. Washington, 466 U.S. 668, 688-91 (1984). As the Iowa Court of Appeals pointed out, the purpose of the verdict form requirement appears to be for "the sole purpose of commitment for evaluation and subsequent proceedings" in the event of an acquittal based upon diminished responsibility. Sillick v. State, 2002 WL 31015257. The facts in Sillick's case do not implicate such a purpose. Further, the jury instructions and verdict form in Sillick's case adequately enabled the jury to find him guilty of a lesser included offense or to acquit him. Accordingly, Sillick has failed to establish that his trial counsel was ineffective for failing to object to the omission, or that his appellate counsel was ineffective for failing to raise the issue on direct appeal. See English, supra, at 613.

Finally, the Iowa Court of Appeals, on review of the Linn County District Court's postconviction relief decision, examined Sillick's claim that his trial and appellate counsel were ineffective for their "failure to attempt to reverse the trial court's pre-trial ruling sustaining the State's Motion in Limine" concerning testimony from a State's expert. ¹⁶

During Sillick's trial, the State called Psychiatrist Curtis Frederickson as an expert witness. In granting the State's motion in limine as to portions of Dr. Frederickson's report, the trial court struck from evidence at trial the statement, "I would note that most inmates who commit crimes like this are doing time for second(continued...)

<u>See Sillick v. State</u>, 2002 WL 31015257. The Iowa Court of Appeals held that Sillick's trial counsel acted reasonably in deciding to refrain from asking the trial court to re-visit the evidentiary issue. <u>Id.</u> Of significance, the Iowa Court of Appeals noted that the Iowa Supreme Court, on direct appeal of Sillick's case, found "no abuse of discretion in the trial court's challenged ruling as any relevancy was outweighed by possible prejudice to the State, and that any ineffectiveness claim derived from the same contention was moot." <u>Id.</u> (citing <u>State v. Sillick</u>, No. 95-578 (Iowa 1997)).

The court finds that Sillick has failed to demonstrate that his trial counsel's decision to refrain from revisiting the motion in limine ruling was objectively unreasonable. See English, supra, at 613. First, Sillick appears to focus solely on what trial counsel could have done, rather than appropriately analyzing whether the choice trial counsel made regarding whether to further challenge the motion in limine ruling was objectively reasonable. Second, the court's determination of counsel's reasonableness is and must be deferential to the state courts' holdings concerning the challenged evidentiary ruling. "In federal habeas corpus proceedings state evidentiary issues are reviewable only when 'the asserted error infringed a specific constitutional protection or was so prejudicial as to deny due process.'" Griffin v. Delo, 33 F.3d 895, 904 (8th Cir. 1994) (quoting Wallace v. Lockhart, 701 F.2d 719, 724 (8th Cir. 1983) cert denied, 464 U.S. 934 (1983)). Due process is denied when the evidentiary error is "gross, conspicuously prejudicial or of such import that the trial was fatally infected." Griffin, 33 F.3d at 904 (citing Rhodes v. Foster, 682 F.2d 711, 714 (8th Cir. 1982)). The Eighth Circuit has ruled that this due process standard mandates a greater showing of prejudice than is needed to support a

 $^{^{16}}$ (...continued)

degree murder." Sillick argues that trial counsel's "tactical choice not to seek the admission of Dr. Frederickson's comparative analysis of other patients to [Sillick] was unreasonable" because trial counsel "had nothing to lose by asking the trial court" to reconsider admitting such testimony.

finding of plain error on direct appeal. <u>Id.</u> (citing <u>Redding v. Minnesota</u>, 881 F.2d 575, 579 (8th Cir. 1989)). Sillick has not established that the evidentiary ruling constituted a denial of due process. <u>See Id.</u> (citing <u>Rhodes v. Foster</u>, 682 F.2d at 714). It follows that Sillick's trial counsel did not breach an essential duty in failing to request reconsideration of the trial court's motion in limine ruling. <u>See English</u>, <u>supra</u>, at 613.

Applying the <u>Williams</u> standard to the lower courts' dismissal of each of Sillick's claims of cumulative error, the court finds that the lower courts' application of the <u>Strickland</u> ineffectiveness standard was not unreasonable as to any of Sillick's cumulative error claims. <u>Williams</u>, <u>supra</u>, at 364-65.

For the reasons discussed above,

IT IS RECOMMENDED, unless any party files objections ¹⁷ to the Report and Recommendation within ten (10) days of the date of the report and recommendation, that the petitioner's application for a writ of habeas corpus be denied.

June 18, 2004.

Magistrate Judge

UNITED STATES DISTRICT COURT

¹⁷ Any party who objects to this report and recommendation must serve and file specific, written objections within ten (10) court days from this date. A party objecting to the report and recommendation must arrange promptly for a transcription of all portions of the record the district court judge will need to rule on the objections.